IN THE

United States Circuit Court of Appeals

FOR THE 9TH CIRCUIT.

No. 2608.

W. G. SIMPSON
and
S. D. SIMPSON,
Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants-in-Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

BRIEF AND ARGUMENT FOR PLAINTIFFS-IN-ERROR.

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Explanation. | The figures in parenthesis indicate the pages of the printed record. The Plaintiffs-in-Error for convenience will be referred to as "the defendants."

STATEMENT OF NATURE AND RESULT OF CASE.

The defendants, W. G. Simpson and S. D. Simpson,

were indicted on February 13th, 1915, for an alleged violation of the National Banking Act. It was charged in the indictment that on or about the 27th day of March, 1913, S. D. Simpson, being the cashier of the American National Bank of Caldwell, Idaho, issued and put forth a $2,500 certificate of deposit without the authority of the Board of Directors and with the intent to injure and defraud the Association. That such certificate certified that there had been deposited by the defendant, W. G. Simpson, the sum of $2,500, but that the said W. G. Simpson did not, at the time the certificate was issued and put forth by the said S. D. Simpson, have on deposit with said National Bank the amount of money equal to the amount specified in said certificate, nor any amount or sum of money whatsoever.

The indictment further charged that the defendant, W. G. Simpson, aided and abetted S. D. Simpson with the intent to injure and defraud the Association in issuing and putting forth the said certificate without the authority of the Board of Directors.

The case came on for trial at the February term of the United States District Court for the Southern Division of the District of Idaho. In appropriate order the defendants filed their plea of jeopardy upon which the coart ordered the jury to find for the Government, they filed their demurrers and motion to quash, which were overruled, and then entered their pleas of not guilty.

On Saturday, February 27th, a verdict of guilty was returned against both defendants embodying an earnest recommendation for the leniency of the court and on March 6th, after their motions in arrest of judgment

and for new trial had been overruled, they were sentenced to five years each in the penitentiary at McNeil Island.

Seasonably a writ of error was granted and perfected.

DEFENDANTS' ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the defendants' plea of jeopardy and former acquittal.

II.

The court erred in overruling the defendants' demurrers and motion to quash the indictment herein.

III.

The court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell, that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walters' note.

IV.

The court erred in refusing to permit the defendants to show by the defendant, S. D. Simpson, that he, the said defendant, S. D. Simpson, executed a warranty deed to his home, which was of greater market value than the certificate in question, which property, after the retirement of the Walters' note by the complete payment thereof, by the defendant, W. G. Simpson, was retained by the bank and has never been returned to the defendant, S. D. Simpson, such testimony bearing directly upon the question of intent and being admis-

sible after the Government had been permitted to prove the entire transaction from March to September 27th, inclusive.

V.

The court erred in that portion of his general charge to the jury wherein he instructed the jury that the phrase and words, "issued and put forth," as used in the bill of indictment, were fully satisfied by the placing of the blank certificate of deposit in question in the hands of the defendant, W. G. Simpson, by the defendant, S. D. Simpson, in the State of Idaho, even though such blank certificate did not, in fact, contain either date, name of payee, amount, or maturity, and even though such certificate did not, in fact, pass out of the hands of W. G. Simpson until a much later date and in a different state, to-wit, the State of Mississippi, where the date and name of payee and amount and maturity were put therein by the defendant, W. G. Simpson, without the knowledge of the defendant, S. D. Simpson, and thereupon negotiated to an innocent holder in the State of Kentucky, because such instruction permitted the jury to convict these defendants for an offense committeed beyond the jurisdiction of this Court. This matter was called to the attention of the court by special instructions..

VI.

The court erred in instructing the jury that they might convict the defendants, either or both of them, if they believed beyond a reasonable doubt that the defendants, or either of them had, without the consent of the board of directors, etc., issued the certificate in question with the intent to injure or defraud, because

the indictment charged such intent to be in the conjunctive, to-wit: that such issuing and putting forth, etc., was done with the intent to injure and defraud.

VII.

The court erred in charging the jury that the intent required by the statute and charged in the indictment could be presumed and the jury would be authorized in presuming it from the spending and use of the $2,425, which the defendant, W. G. Simpson, had realized upon his own note attached to which was a certificate of deposit which he had made from a blank given him by S. D. Simpson, because any intent that might have been in the minds of the defendants at the time they were using such $2,425 would not meet the measure of the law or the allegations of the indictment, unless such intent had also existed at the time the certificate in question had been issued and put forth, even though such subsequent use might, in reality, constitute another sort of an offense against the National Banking Law.

VIII.

The court erred in overruling the defendants' plea of jeopardy and former acquittal, because at the trial of this case at the September, 1914, term, a jury was empaneled, the defendants entered their plea, witnesses were sworn, testimony was taken and the arguments of counsel were had, all of which occupied more than three days of the court's time, at the end of which time the defendants asked for an instructed verdict on the ground that the indictment did not allege that the certificate was put forth without the consent of the board of directors, whereupon the court, of his own motion, dis-

charged the jury, over the protest and exception of the defendants, because even though such indictment may not have contained a clause sufficient to have made it correct for the unlawful issue of a certificate of deposit, the same did, in fact, charge an offense under the National Banking Laws, to-wit: that of misapplication.

IX.

The court erred in overruling the defendants' demurrer and motion to quash the bill of indictment, because said indictment is, in fact, duplicitous in that it attempts to charge more than one offense in the same count, to-wit: the commission of an act to injure the bank, the commission of an act to defraud the bank, the issuing of a certificate of deposit, and the putting forth of a certificate of deposit, four separate and distinct felonies.

X.

The court erred in overruling the defendants' demurrer and motion to quash the indictment, because the said indictment states no offense against the laws of the United States, in that the facts therein attempted to be alleged, might be entirely innocent, because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit, the sum of money therein specified, nor any part of it.

XI.

The court erred in refusing to permit the defendants' counsel to advise the jury in their argument that a conviction of the defendants would mean a penitentiary sentence, because the jury retired to consider over their verdict at 9:45 on Friday night, February 26th, and at

1 o'clock a. m., Saturday morning, February 27th, the jury returned into court and asked that the court re-read to them his instructions upon the question of intent, and they thereupon retired to the jury room and stayed in continuous session all night long, without succor or sleep, until about 7 a. m., when they were taken to breakfast and then returned to the jury room and at shortly after 10 o'clock on the morning of Saturday, February 27th, they brought into court a verdict reading substantially as follows: "We, the jury, find the defendants guilty, but most earnestly ask the leniency of the court," which was a compromise verdict and the result of mental and physical exhaustion with the consequent weakened resolution and was found without the knowledge of the grave consequences of such a conclusion.

XII.

The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, $3,500, because such testimony was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had, in March, 1913, when they issued, if they did issue, and put forth, the certificate in question.

XIII.

The court erred in overruling the defendants' motion in arrest of judgment, because such motion specifically attacked the alidity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted, and

that the court had erred in the conduct of the trial, and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from said motion to arrest, which is referred to and made a part of this assignment.

XIV.

The court erred in failing to grant these defendants a new trial for all of the reasons set forth in their amended motion for a new trial, which motion is made a part thereof and in the interest of brevity is not repeated.

XV.

The court erred in refusing to permit the defendants to show all of the account of each of them in the individual ledger of the American National Bank, because the court had permitted the Government to introduce the ledger showing such accounts up to and including the 30th day of July, 1913, since such accounts would have shown the deposit by the defendants of various and sundry sums of money after said date, and the same were admissible upon the question of good faith and intent and to rebut certain presumptions that were sought to be indulged in from the portions of such accounts introduced by the Government.

XVI.

The court erred in failing to give defendants' specially requested charge No. 1, or the substance thereof, which directed the jury that the venue was a matter of fact that the Government must prove beyond a reasonable doubt and that if the certificate of deposit de-

scribed in the indictment was not issued and put forth within the jurisdiction of this court, but was issued and put forth in the State of Mississippi, or anywhere else, or if they had a reasonable doubt upon that question, they should acquit the defendants, because such requested charge is the law.

XVII.

The court erred in that portion of his charge to the jury wherein he instructed the jury in substance, that even though the defendant, S. D. Simpson, had issued hundreds of certificates of deposit without any authority of the directors, other than by implication, that such implied authority would not protect him in the issuance of the certificate in question for the reason that no money or its equivalent had been deposited with the bank at the time of such issuance, because the statute does not require that the funds or their equivalent be deposited with the bank at the time the certificate is issued, nor prior thereto, nor simultaneous therewith, nor thereafter, and there was no reason why the said implied authority to issue could not have been acted on in good faith by the defendant, S. D. Simpson, with reference to the certificate in question, as with any other certificate, or, at any rate, this issue should have been left, as a matter of fact, to the jury for its determination.

XVIII.

The court erred in failing to give defendants' specially requested charge No. 2, or the substance thereof, and particularly that part thereof which instructed the jury that the practice of the defendant, S. D. Simpson,

to issue certificates of deposit without first consulting the directors, of which practice the directors well knew, and the fact that the directors ratified the issuance of this certificate when first they saw it, would, in law, constitute such an authority to issue as the statute demanded and, therefore, the defendants should have been acquitted, because such instruction embraced the law with reference to the undisputed facts.

XIX.

The court erred in failing to give defendants' requested instruction No. 3, wherein it was requested that the jury be told that if, as a matter of fact, they found that the certificate was not dated, nor made payable to anyone, nor filled in for any amount, nor bearing any maturity when the same left the State of Idaho then and in that event they should acquit for the reason that a commercial instrument is not legally complete without date, amount, payee, and maturity stated therein, and there can be no agency legally constituted that may supply such information if the principal is in ignorance as to such information and, further, because there was no charge of conspiracy made against these defendants, and further, beeause the offense was not committed in Idaho.

XX.

The court erred in failing to give to the jury specially requested charge No. 4, or the substance thereof, wherein the jury was instructed that they should find where the blank in fact became a certificate and if they found that it became a certificate in the State of Mississippi, and was issued and put forth, they should acquit, because such stated the law.

XXI.

The court erred in failing to give defendants' requested charge No. 15, or the substance thereof, which directed the jury to return a verdict of not guilty, because of the duplicitousness of the indictment in that it attempted to charge four different and distinct offenses by the conjunctive use of the words, "injure and defraud," and the conjunctive use of the words, "issued and put forth," because the statute makes each and all of such acts a distinct felony.

XXII.

The court erred in failing to give defendants' requested charge No. 14, or the substance thereof, wherein it was desired that the jury be told that the word "issue" and the words "put forth," as used in the indictment, have a special legal meaning, which is, in substance, that the instrument declared upon in the indictment must have been complete at the time it went into the hands of the holder; in other words, it must have been dated, signed, must have carried an amount, a payee and a maturity, because otherwise it would not be a certificate of deposit and therefore, was never issued or put forth within the meaning of the statute.

XXIII.

The court erred in failing to give defendants' requested charge No. 5, wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the $2,425, would not be the venal intent demanded before conviction, because the law demands that one's act be meas-

ured criminally by the intent existing at the time the act was committed.

XXIV.

The court erred in failing to give the defendants' specially requested charge No. 6, wherein it was asked that the jury be instructed to acquit the defendants since the proof would not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court, nor with the intent the law demanded, nor without the consent of the directors.

XXV.

The court erred in failing to give defendants' requested charge No. 7, which asked the jury by instruction that they should acquit unless they found that the defendants intended at the date of the issue of the instrument to injure and defraud the bank, such being the allegation of the indictment.

XXVI

The court erred in failing to give the defendants' requested charge No. 10, or the substance thereof, wherein it was asked that the jury be told that the statute does not require that money or its equivalent be deposited in a bank, or with a bank, before that bank shall issue a certificate of deposit, nor does the law require that one shall deposit money or its equivalent before a bank shall issue to him a certificate of deposit, because the statute denounces the issuance of a certificate of deposit with the intent to injure or defraud and without the consent of the board of directors, and

makes no other requirement with reference to the issuance of such instruments.

XXVII.

The court erred in refusing to give defendants' requested charge No. 11, or the substance thereof, wherein it was asked that the jury be told that the statute did not require that the consent of the board of directors should be secured concurrent with the issuance of a certificate of deposit, because under the wording of the statute, such consent could be given before, at the time of, or after a certificate of deposit was issued and be entirely sufficient.

XXVIII.

The court erred in failing and refusing to give defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore, if they found that the board of directors, or if they had a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all the facts with relation thereto, then and in that event, such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well-known rule of ratification, which dates back

to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed.

XXIX.

The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said certificate with the intent of applying the proceeds thereof to the uses of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event they should acquit the defendant, W. G. Simpson, because such instruction stated the law.

XXX

The court erred in refusing to give defendants' requested charge No. 5-A, wherein it was asked that the jury be instructed that if they believed from the evidence that at the time of issuing the certificate the defendants issued the same without any intent to injure or defraud the bank but intended to use the same as a means of obtaining money to meet the necessities of the bank, and to turn over to the bank, but that afterwards the defendants, or either of them, changed their or his mind and decided to appropriate the proceeds, they could not be convicted, because the statute requires that the evil intent exists at the time of the issuing or putting forth of the certifiicate.

XXXI.

The court erred in instructing the jury to bring in a verdict against the defendants on their plea of former jeapordy and acquittal, because the Government had neither traversed nor demurred thereto and further because such action was prejudicial to the defendants' rights, and further because such instruction was given the same jury that had been empaneled to try the issue of the guilt or innocence of the defendants upon the indictment then and there before the court.

Said defendants and each of them respectfully submit the above and foregoing as their and his assignments of error committed by the court upon the trial of the above entitled and numbered cause, and he and they respectfully pray a reversal of the judgment on account of such errors so assigned by him and them.

THE DEFENTANTS' FIRST ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' plea of jeopardy and former acquittal.

STATEMENT.

Also assigned as Eighth Assignment more at length (150).

On the 23rd of February the defendants filed their plea of jeopardy (12-19). In substance such plea alleged that a court with competent jurisdiction had, on the 16th, 17th and 18th days of September, 1914, tried the defendants upon the identical indictment to which they were again asked to plead; that in the United States District Court for the Southern Division of the

District of Idaho they had, on the 16th of September, 1914, entered their plea of "not guilty" to an indictment identical with the one now before the court except that the same did not contain the clause: "Without the authority of the Board of Directors," and thereupon the trial was proceeded with during the 16th, 17th and 18th days of September, the Government offering its witnesses in testimony and closing its case and the defendants closing their case and the Government having offered its argument to the court and jury, and the defendants having offered their argument to the court and jury, when one of the defendants' counsel suggested to the court that the indictment did not contain the clause: "Without the authority of the Board of Directors," and thereupon the court, over the defendants' objection and when the defendants were demanding a verdict at the hands of the jury, discharged the jury, and remanded the defendants, at the request of the District Attorney, to abide the action of the Grand Jury (12-19).

That the indictment upon which the defendants were tried in September, 1914, and which was the basis for their plea of jeopardy, was in the following words and figures and carrying the same docket number as the one upon which they were convicted:

> **"In the District Court of the United States within and for the District of Idaho, Southern Division.**
>
> **February Term, 1914.**
>
> **THE UNITED STATES OF AMERICA,**
>
> **vs.**
>
> **S. D. SIMPSON AND W. G. SIMPSON,**
>
> **Defendants.**

INDICTMENT.

Charge—Issuing Certificate of Deposit without authority, Vio. Sec. 5209, R. S. U. S.

The Grand Jurors of the United States of America, being first duly empaneled and sworn, within and for the District of Idaho, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That heretofore, to-wit: on or about the 27th day of March, 1913, at Caldwell in the County of Canyon and State of Idaho, and within the jurisdiction of this Court, one S. D. Simpson being then and there the Cashier of a certain National banking association then and there known and designated as 'The American National Bank of Caldwell,' which said association had been theretofore created and organized under and by virtue of an Act of Congress entitled, 'An act to Provide a National Currency secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption thereof,' approved June 3, 1864, and which said association was then and there acting and carrying on a banking business at the city of Caldwell in the said district under the said Act of Congress, and Acts amendatory thereto, and which said association was then and there authorized to lawfully issue and put forth certificates of deposit drawn upon said association, did wilfully, unlawfully and feloniously and with the intent to injure and defraud said association, issue and put forth a certain certificate of deposit drawn upon said association in the sum of $2,500 therein and thereby certifying that there had been deposited by one W. G. Simpson in and with said association, the said sum of $2,500, which said certificate of deposit was then and there in words and figures following, to-wit:

'The Monticello Banking Co.,
Monticello, Ky., 9715
THE AMERICAN NATIONAL BANK 1549
OF CALDWELL.

No. 1991—Int. $2,500.00
62.50

$2,562.50

Caldwell, Idaho,
March 27, 1913.

CERTIFICATE OF DEPOSIT.

Not subject to check.

W. G. Simpson has deposited in this bank Twenty-Five Hundred and No.-100 Dollars payable to the order of himself in current funds on the return of this Certificate properly endorsed six months after date, with interest at 5 per cent per annum. No interest after maturity.

S. D. SIMPSON, Cashier.

Due Sept. 27th.'

In the center of the face of said certificate of deposit appears a circle with a capital C in pad or purple ink, and which said certificate of deposit, after having been so issued and put forth as aforesaid, has been on the back endorsed as follows:

W. G. Simpson. All prior endorsements guaranteed. Pay to the order of any bank or banker Sep. 22, 1913. The Monticello Banking Co., 73-258 Monticello, Ky., W. L. Baker, Cashier. 9-22-9715.

92-50. Previous endorsements guaranteed. Pay any bank or banker or order. Sep. 27, 1913. First National Bank, Caldwell, Idaho. W. P. Lyon, Cashier.

Pay to the order of First Nat. Bank, all prior endorsements guaranteed. First National Bank of Chicago 2-1 Sep. 24, 1913. 2-H. A. Howland, Cashier.

All prior endorsements guaranteed pay to the order of any bank or banker, Sep. 23, 1913. Please report by our No. 3204, National Bank of Kentucky, Louisville, Ky. H. D. Ormsby, Cashier.'

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present, that the said W. G. Simpson, to whom said Certificate of Deposit was then and there issued and put forth as aforesaid, did not then and there, to-wit: at the time the said certificate of deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association, an amount of money then and there equal to the amount then and there specified in said certificate of deposit, to-wit: the amount of $2,500, nor any amount or sum whatsoever as he, the said S. D. Simpson, then and there well knew, and so the said S. D. Simpson did, at the time aforesaid and in the manner and form aforesaid, wilfully, unlawfully and feloniously, and with the intent to injure and defraud said association, issue and put forth the aforesaid certificate of deposit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present: That the said W. G. Simpson, late of the city of Caldwell, in the district aforesaid, then and there being the identical person to whom said certificate of deposit was in the manner and form aforesaid issued and put forth heretofore, to-wit: on the day and year last aforesaid at said Caldwell and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously, and with the intent aforesaid to injure and defraud the said as-

sociation, aid, abet, incite, counsel and procure the said S. D. Simpson, cashier of said association so as aforesaid, to wilfully, unlawfully and feloniously, and with the intent aforesaid, issue and put forth the said certificate of deposit in manner and form aforesaid to do and commit, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of $2,500, or any sum at all on deposit with the said association;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY KEYSER,

United States Attorney for the District of Idaho.

C. J. SINSEL, Foreman of the Grand Jury of the United States.

Witnesses examined before the Grand Jury in the above case—E. M. Henden, Fred Brown, Roy Brollier, M. J. Devers.

Indorsed: Filed February 13, 1915. A. L. Richardson, Clerk, by Pearl E. Zanger, Deputy Clerk.'' (14-19).

The Government filed a replication to the plea, alleging in substance that the question of the insufficiency of the indictment was raised by one of the attorneys for the defendants and that the indictment was quashed and the jury discharged, and thaf the defendants, nor either of them, were ever tried, convicted or acquitted on a sufficient indictment (19-20). The journal of the court was introduced in testimony and shows that after the trial had progressed for the third day and after all the testimony had been introduced and after argument had been made by both the Government and the defendants, one of the attorneys for the defendants moved the court

for a peremptory instruction to the jury to return a verdict of not guilty, which motion was opposed by the Government's attorneys, and after argument the court ordered that said motion be denied, to which action of the court the defendants excepted and the court ordered the indictment quashed and discharged the jury, over the protest of the defendants (20-21; 101-102).

After the testimony upon this plea was taken and argument was heard, the court instructed the jury to find a verdict thereon in favor of the United States against the defendants, which was accordingly done (55-56; 66-68; 70). The defendants reserved an exception to this procedure (71; 101-102).

AUTHORITIES.

Fifth Amendment U. S. Constitution.
Ball v. United States, 163 U. S. 662.
United States v. Sanges, 144 U. S. 310.
Ex Parte Parks, 93 U. S. 18.
2 Bishop New Criminal Procedure, 773.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States declares: "Nor shall any person be subject to be twice put in jeopardy of life or limb." The Supreme Court in the Ball case says that such prohibition is not against being twice punished but against being twice put in jeopardy and the accused, whether convicted or acquitted, is clearly put in jeopardy at the first trial.

In that same case the following language is used:

> "**But although the indictment was fatally defective but if the court had jurisdiction of the cause and of the party its judgment is not void, but**

> only voidable by writ of error; and unless so avoided, cannot be collaterally impeached. But if the judgment is upon a verdict of guilty and unreversed, it stands good and warrants punishment of the defendant accordingly and he cannot be discharged by a writ of habeas corpus. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed and the Government cannot. But the fact that the judgment of the court having jurisdiction of the case is practically final, affords no reason for allowing its validity and conclusiveness to be impugned in another case."

It will be remembered that in the Ball case the indictment was fatally defective in that it failed to show proper venue and death of the deceased within the common law period of a year and a day.

The defendants in the case at bar suffered all the expense and hazard of a three-days' trial in a court of competent jurisdiction and were then denied the right of a verdict. Such trial and hazard and denial were had upon an indictment identical in language and terms and number with the one upon which they were convicted six months later save and except that the words "authority of the Board of Directors" were not therein. It is true that Sec. 5209, under which the prosecutions were had seems to only penalize the issuance of such certificates as are issued without the consent of the directors but, as said by some of the learned judges discussing the question of jeopardy, it is entirely possible that such an indictment is good since it may state some other offense of Sec. 5209 or since such a slight imperfection may not have been noticed by the

defendants, or by their attorneys, or by the court, in which event had they been convicted, they would have suffered and therefore the humane courts hold that such liability is jeopardy. The record in this case shows that the absence of the clause mentioned had for many months escaped the attention of the Government's prosecuting officer and had escaped the attention of the presiding judge during all the time that the cause was on trial.

Bishop, in his new work on Criminal Procedure, Vol. 2, pages 773-774, announces in substance that when the trial panel is full and sworn and the clerk of the court directs the jury to look on the prisoner and hearken to their evidence and when he states to them the substance of the indictment, the plea and their duty to find the defendant guilty or not guilty, the jeopardy of our constitutional law has begun. The prosecuting officer cannot now deny that he is ready and there can be no non-suit, as in a civil case. If a conviction cannot be had, the prisoner is entitled to an acquittal by verdict. The court in the instant case practically entered a non-suit so the Government could amend and start all over.

THE DEFENDANTS' NINTH ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' demurrer and motion to quash the bill of indictment because said indictment is in fact duplicitous in that it attempts to charge more than one offense in the same count, to-wit: the commission of an act to injure the bank, the commission of an act to defraud the bank, the issuing of a certificate of deposit and the putting forth

of a certificate of deposit—four separate and distinct felonies.

STATEMENT.

This assignment (151) is also assigned as Second Assignment (148).

The defendants filed, on February 23rd, 1915, before their plea of jeopardy, their demurrers and motion to quash, which included the following grounds:

(a) The duplicity of the indictment because it charged that the acts were done with the intent to "injure" **and** with the intent to "defraud," and it is charged that the defendants had "issued" and "put forth" the certificate in question; that is to say, it attempts to charge the doing of an act with "intent to defraud" and the doing of an act with the "intent to injure" and the issuing of the certificate and the putting forth of the certificate, each of which is, if properly plead, a distinct felony and a distinct offense under Sec. 5209.

(b) That the indictment stated no offense known to the law because it alleged the issuing of the certificate of deposit in question when W. G. Simpson "**did not have on deposit with the said bank the sum of $2,500, or any amount or sum whatsoever**" (21-24), such motion in its entirety being as follows:

"I.

"**Come now the defendants and show to the court that the indictment in the above styled and numbered case states no offense known to the laws of the United States of America. Wherefore, they pray judgment.**

II.

Further demurring and moving to quash the above styled and numbered indictment, the defendants and each of them plead that the same is duplicitous in that it charges four separate and distinct offenses; (1) it charges these defendants with having issued and put forth a certificate of deposit with intent to injure the National Banking Association therein mentioned, and (2) it attempts to charge these defendants with having issued the certificate of deposit herein mentioned with intent to defraud the National Banking Association therein mentioned; (3) it attempts to charge these defendants with having issued the certificate of deposit therein mentioned, and (4) it further attempts to charge these defendants with having put forth the certificate of deposit therein mentioned. Thus it attempts to charge the doing of an act with intent to injure; the doing of an act with intent to defraud; the issuing of a certificate of deposit and the putting forth of a certificate of deposit, each of which acts is, if properly pleaded, a distinct offense under Section 5209.

III.

The said indictment is further defective and subject to demurrer and motion to quash, both of which suggestions and motions are here now made, because the same attempts to plead and does plead a state of facts which do not constitute a violation of that portion of Section 5209 which makes it criminal to issue a certificate of deposit under the conditions therein inhibited; such facts being the pleading of what appears to be testimony which, if true, does not constitute a violation of Section 5209. In other words, the statute does not denounce as criminal the issuance of a certificate of deposit without the authority of the board of directors, and

such allegations are therefore impertinent and do not allege facts constituting an offense.

Further for other demurrers and objections to said bill of indictment and reasons for quashing the same and holding the same for naught, these defendants show that the said bill is uncertain, vague and indefinite and does not sufficiently apprise them of the charge sought to be made against them, in that in one portion thereof it is alleged and averred that a certificate of deposit was issued and put forth wherein it was certified that there had been deposited by one W. G. Simpson in and with said Association the sum of $2,500 and in another portion thereof it is alleged and averred that at the time said certificate of deposit was so issued and put forth the said W. G. Simpson did not have on deposit with the said National Banking Association the said sum of $2,500, or any amount or sum whatsoever, and there is no statement or allegation or averment that the said W. G. Simpson had not in fact deposited $2,500 in said bank to the credit of said bank, or paid over to said bank the said sum of money. .In other words, the allegations made in the bill of indictment might be thoroughly consistent with the legal issuing of said certificate of deposit and the allegations and averments in said indictment in said regard are not inconsistent with the innocence of the defendants, and each and both of them.

Said indictment is further vague, inconsistent, and does not give these defendants sufficiently to understand the charge made against them, in that it is alleged in said bill of indictment that said National Banking Association and its board of directors were authorized to issue and put forth certificates of deposit drawn upon said Association, and then proceeds to set forth an alleged state of facts

which would show the drawing of the certificate therein describel by the said Association.

Wherefore defendents pray that they go hence without day.''

Said motion and demurrer were overruled, to which action of the court the defendants excepted (53; 65-66).

The indictment charges: ''And with the intent to injure **and** defraud said Association'' (8); and again it contains the words: ''And with intent to injure and defraud said Association'' (10); and again it charges, ''And with intent to injure **and** defraud the said Association'' (11). In other words, it always uses the conjunctive between the words ''injure and defraud.'' Nowhere in the indictment does it use the disjunctive ''or'' between these words as it is used in the statute.

AUTHORITIES.

U. S. R. S. 5209.
U. S. v. Norton, 188 Fed. 259.
Billingsley v. U. S. 178 Fed. 659.
1 Bishop's New Criminal Procedure, 353.
U. S. v. Corbett, 215 U. S. 233.
Lew Allen v. U. S. 223, Fed. 18.

ARGUMENT.

Duplicity in criminal pleading is the joinder of two or more distinct offenses in one count. When an indictment is subject to such criticism it will be quashed on motion, or it may be demurred to or the prosecutor may be put to his election on which charge to proceed (Bishop's New Criminal Procedure, Vol. 1, page 361,

with authorities therein cited). Such objections must be raised before trial and they are too late after verdict (Morgan v. U. S. 148 Fed. 189). If, therefore, there is anything in the contention of the defendants, they made such contention seasonably by appropriate motions and demurrers.

Section 5209 denounces embezzlement, abstractions, or misapplications. It also denounces the issuing or putting in circulation any notes of the Association. It also denounces the issuing or putting forth of a certificate of deposit. It also denounces the making of a false entry in a book or report or a statement of the Association, and then adds the words, "**In either case,**" to injure or defraud the Association, etc., or to deceive any agent, etc. Manifestly the statute creates, because there were no such offenses before, at least nine distinct felonies.

Is it an offense to issue a certificate of deposit without the authority of the directors with the intent to injure the bank? Is it an offense to issue a certificate of deposit without the consent of the directors with the intent to defraud the bank? Certainly.

We cannot assume that Congress, in the use of the words, "Injure and defraud," in the phrase "Injure or defraud" intended to use synonyms because we know that there are many ways that a bank could be injured by some of the officers enumerated in the statute under discussion, without being defrauded of a penny and that Congress had in mind the remedying and prevention is evident from the latter part of the statute, which clearly creates a felony out of the act of making a false entry for the purpose of deceiving the treasury officials

without the slightest danger of defrauding or without the slightest attempt to defraud.

If, then, there were and are two different intents, viz: an intent to injure and an intent to defraud, then and in that event the indictment is clearly duplicitous because it charges that the acts were done with both intents, and there is no offense created by the statute without the venal intent therein mentioned. In other words, no act is an offense unless it have the bad intent that the statute couples with that particular act.

Judge Campbell, in the case of the United States v. Norton, 188 Fed. 259, uses this language:

> "It is therefore seen that there are nine distinct acts, each of which, when coupled with the intent to injure or defraud, or with the intent to deceive, mentioned in the statute, becomes a separate and distinct offense. The making of a false entry is not in itself what the statute condemns; but it is the making of it with any one of the several intents mentioned therein. The gravamen of the offense is not the mere making of the false entry; but coupled with the act there must be one of the intents condemned by the statute. A false entry made by mistake, or one knowingly made, but with no intent to injure, defraud, or deceive in any of the respects condemned by the statute, would not be an offense against the statute. 'A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law does not.' Bishop on Stat. Crimes, Sec. 132. As, therefore, it is not every false entry, even when knowingly made, but only such as is concurrent with some particular intent named in the statute,

> which is condemned, it may, I think, be properly said that the criminal intent is the gravamen of each offense contemplated by section 5209. .Evans v. United States, 153 U. S. 11c. cit. 594; 14 Sup. Ct. 934; 38 L. Ed. 830.''

To the same effect is the reasoning of the United States Circuit Court of Appeals for the Eighth Circuit. In Billingsley v. the United States, 178 Fed. 655:

> ''There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act constitutes an offense. One of them is the intent ''to injure or defraud'' and the other the intent ''to deceive.'' The contention that there can be no offense in making a false entry with the intent to deceive an agent appointed to examine the affairs of the association unless there be also the co-existing intent to injure or defraud the association, etc., seems to ignore the grammatical structure of the statute and the natural meaning of the language employed. Either the intent to injure or defraud or the intent to deceive, when accompanying the doing of the substantive act to which they appropriately pertain seem, according to the language employed, to constitute an offense. . Any other construction would, in our opinion, give practical immunity to the making of a false entry with the intent to deceive, etc.''

The verbiage of the statute itself seems to warrant the construction that we now contend for and that has been given by the two courts above mentioned when the phrase ''in either case'' was used. In other words, Congress seemed to have in mind that there were being a number of new offenses and felonies created.

If we are correct in this, our motion to quash and

our demurrers should have been sustained because it is an elementary rule of pleading that an indictment must not in the same count charge the defendant with two or more distinct and separate offenses and in case it does so, it is bad for duplicity if the offenses are inherently repugnant or are different stages in one transaction, or involve different punishments (22 Cyc. 376, and cases there cited).

It follows, then, says Judge Campbell in the Norton case, that an indictment which in one or the same count charges an officer or agent of the bank with embezzling **or** abstracting its funds, or with abstracting **and** misapplying its funds, or with embezzling its funds **and** making a false entry in a book or report, or combining in the same count the charge of the doing of two or more of the nine distinct acts mentioned, would clearly be duplicitous, and, on a proper and timely objection, would have to be quashed.

But in the indictment now under consideration there is but the issuing of a single certificate of deposit without the authority of the directors. This act, however, as we have seen, is not condemned by the statute except it be coupled with the concurrent intent **either** to injure **or** defraud in the respect mentioned in the statute. The pleader, therefore, must charge **not only the act but the intent.** In this case, he charges that the act was done **both** with the intent to injure and with the intent to defraud, either one of which intents, coupled concurrently with the act, makes that act an offense, and thus two separate and distinct offenses are joined in the same count and such count is, therefore, duplicitous.

Again, the defendants contend that the indictment is fatally defective and was subject to their demurrers and motion for the reason that the indictment alleged that the certificate in question was issued to W. G. Simpson when he, the said W. G. Simpson: "**Did not then and there have on deposit with the said bank an amount of money equal to the amount of the said certificate, or any amount or any sum of money whatsoever**" (10-11). It is entirely immaterial whether one to whom a certificate of deposit is issued has the money on deposit or not. Neither the statute nor any other law contains any requirement of that sort. The certificate itself does not allege that the one to whom it is issued has on deposit the sum therein named, or any other sum. One might have paid for a certificate of deposit or might have deposited to the credit of the issuing bank the amount and yet himself have no deposit whatsoever with the bank. The statute merely creates the offense of issuing a certificate of deposit when it is so issued without the consent of the board of directors and with the intent to injure **or** defraud the issuing bank. Such indictment, therefore, states no offense known to the law, pleads inconsistently and is duplicitous.

DEFENDANTS' THIRD ASSIGNMENT OF ERROR.

The court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walters' note.

STATEMENT.

The defendants offered to prove by themselves and by the directors of the American National Bank that on September 27, 1913, the certificate of deposit in question came into the bank for payment; that the directors, with knowledge of the facts as to its original issuance—that is, that it was issued without the bank having received the money therefor, ratified its issuance and ordered its payment, one of the directors giving his note which passed into the loans and discounts of the bank, for the amount necessary and the defendant, S. D. Simpson, deeded his home to the bank, which was worth much more than the amount in controversy, and within one week's time thereafter the defendant, W. G. Simpson, when he learned of the facts, sent his check for $2,500 plus, which was duly paid and the entire certificate retired, which testimony the court declined to permit and the defendants then and there duly and seasonably in open court excepted (114-115).

The following also happened in this connection, S. D. Simpson, being on the stand, testified:

Q. By his attorney, Mr. Atwell: "When before the trials in this court, did you see, the first time after you had given blank certificate No. 1991 to your brother, did you see it?

A. September 27th, when it was presented for payment and I paid it.

Q. What did you do with it when you got it?

Mr. Snead, for the Government: We object to what he did with it as immaterial.

A. Mr. Walters took it—

Q. Mr. Snead. We object to going into this matter.

It is the same matter that has been ruled on several times here.

The Court: He can state what he did with it. Do you mean handed it to some one?

A. When it was presented for payment, Your Honor?

Mr. Atwell. What did you do with it when it was presented for payment?

A. I called a meeting of the directors" (112-115).

Thereupon the tender was made to offer testimony of the defendants and the board of directors showing in substance that on September 27th, when the certificate was returned for payment to the bank the defendant, S. D. Simpson, took it at once to the board of directors who ratified its issuance and ordered its payment and Simpson deeded his home to the bank to guarantee the directors arranging for its payment against loss, and within one week of that time, or by October 1st, the other defendant, W. G. Simpson, had forwarded his check to settle the entire matter, which tender and testimony the court declined, whereupon the defendants duly and seasonably in open court excepted (112-115).

The court will bear in mind in this connection that the defendant, S. D. Simpson, had, according to his and his brother's testimony, turned over to his brother some blank certificates of deposit to which S. D. Simpson had signed his name as cashier, that these blanks were turned over to W. G. Simpson in Caldwell, Idaho, that they did not contain amount, date, name of payee nor maturity (99-101). That this was some time in

March or April, 1913. That the next time the defendant, S. D. Simpson, saw the certificate in question was on September 27th, 1913, when it was presented for payment (102-147).

The defendant, S. D. Simpson, as cashier, issued certficates of deposit during the regular course of business without consulting the directors each time; in other words, they were issued as part of his duties.

The defendant, W. G. Simpson, testified in substance to the above and in addition that these certificates were handed him by his brother for the purpose of raising some money for the bank in some of the Eastern States, where money might be more plentiful and cheaper; that he finally went to Meridian, Mississippi, his then home, and, after corresponding, succeeded in making a $2,500 loan on his note with the certificate attached as collateral, with Mr. Baker, the cashier of the bank at Lexington, Ky. That he, thereupon, in Meridian, Mississippi, filled in the certificate as to date, amount, maturity and payee, attached it to his note and forwarded it to the Kentucky banker and subsequently forwarded the proceeds thereof to his brother, S. D. Simpson, advising him to place the same to the credit of the bank, but the defendant, S. D. Simpson, placed it to the credit of himself, W. G. Simpson, by error (115-147). Undisputed facts (96, 97, 98).

The record contains a carbon of the letter of transmission (127). The books of the bank show that the amount went to the credit of W. G. Simpson instead of to the credit of the certificate of deposit, as it would have done, if the defendant, S. D. Simpson, had followed the instructions of W. G. Simpson. S. D. Simp-

son says he so deposited it by error. It was held in Kentucky until its maturity, which was the expiration of six months, and it was then forwarded for payment and was received and paid by the Caldwell bank on or about September 27th, when the directors had ratified it and ordered it paid. The bank never lost a penny by the transaction. The entire amount, principal and interest, was paid by the defendants.

The defendants requested that the court charge the jury as shown in Special Charge No. 2 in the following words:

> "**The charge made against these defendants is that they issued in Canyon County, Southern Division of the District of Idaho, a certain certificate of deposit without the consent of the board of directors. It is in evidence before you that the cashier, S. D. Simpson, one of the defendants herein, was in the habit of issuing certificates of deposit without first consulting the directors of the institution and that the directors knew this. It is further in evidence that when the certificate was received in Caldwell for payment on September 27, 1913, the board of directors of the bank met and ratified its issuance and ordered it paid, and you are therefore instructed that such ratification, as a matter of law, dated back to the time of its issuance and rendered valid its issuance, and you are, therefore, directed to acquit both defendants" (38-39),**

which the court refused to give either in whole or in part or in substance, to which action of the court the defendant duly and seasonably in open court excepted (92).

The court charged the jury that the cashier, by virtue of his official position, has authority to issue a certificate of deposit for moneys actually deposited in the bank (78), "but no such general or implied authority from the board of directors exists in the cashier to issue a certificate of deposit falsely stating that the person to whom it is issued has deposited, or has on deposit, the amount therein stated. In other words, there is no general authority in a cashier to issue a certificate of deposit except in cases where the bank has received the money or its equivalent and the fact that the board of directors may know it to be the practice of the cashier to issue certificates of deposit covering moneys actually received and acquiesced therein, does not imply an assent upon their part to the issuance of a certificate when no money or other thing of value is received. And so in this case the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made would constitute no warrant to the cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value" (79). Said the court in his charge.

AUTHORITIES.

Norton v. Shelby, 118 U. S. 425.
Heyn v. O'Hagen, 26 N. W. 861; 60 Mich. 150.
Reid v. Field, 1 S. E. 395; 83 Va. 26.
Ruffner v. Hewitt, 7 W. Va. 585.
Lorab v. Nissley, 27 Atl. 242.
Bell v. Borough, etc., 45 Atl. 930.
Municipal Security Co .v. Baker Co., 54 Pac. 174.

Storey v. McLay, 13 Pac. 198.
Schuenfeldt v. Junkermann, 20 Fed. 357.
Iowa State Savings Bank v. Block, 59 N. W. 283.
Sims v. the State (Tex.), 87 S. W. 689.
Schagun v. Scott Mfg. Co., 162 Fed. 209.
Allen v. Corn Exchange Bank, 84 N. Y. Sup. 1001.
Larsen v. Thuringia, etc., 70 N. E. 31; 208 Ill. 166.

ARGUMENT.

There is no requirement in the statute as to when the money shall be deposited for a certificate of deposit—whether it shall be simultaneous with its issuing, before its issuing, or after its issuing is conjectural. Whether it shall be deposited at all, is utterly immaterial so far as the statute is concerned. The statute merely makes it an offense to issue a certificate or put forth a certificate without the authority of the board of directors. The directors, therefore, could authorize the issuance of a certificate of deposit when, as a matter of fact, there had been no deposit made.

The testimony offered by the defendants clearly showed ratification. Ratification is the approval of that which was attempted but which was improperly or unauthorizedly performed in the first instance.

The doctrine of ratification proceeds on the theory that there was no previous authority. Ratification when fairly made—that is, when made with knowledge of all the facts, will have the same effect as an original authority. In short, the act is treated there as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction and has a complete retroactive ef-

ficacy. Ratification is equivalent to antecedent authority. Ratification bears upon the act ratified in the same manner as though the authority of the agent to do the act existed originally.

The case as submitted by the defendants showed a desire upon their part to realize funds for the bank. They were not sure they could do so. They did not know, if they could do so, how much could be realized nor from whom nor when repayment would be desired, nor the date upon which it was to be realized and thereupon the blank certificates were sent out to another State in the hope that a transaction could be consummated and at the earliest possible date after the return of the certificate, and only one of them was negotiated, the board of directors ratified its issuance.

Manifestly if such ratification had the effect that the foregoing authorities maintain it had, such certificate was in fact **issued** within the meaning of the law, "with the authority of the board of directors."

Therefore, the court committed a grave error against the rights of the defendants in refusing to permit them to prove such ratification and in charging the jury as shown, and in refusing the Special Charge along this line submitted by the defendants, or the substance thereof.

DEFENDANTS' FOURTH ASSIGNMENT OF ERROR.

The court erred in refusing to permit the defendants to show by the defendant S. D. Simpson, that he, the defendant S. D. Simpson, executed a warranty deed to his home, which was of a greater market value than the certificate, which home, after the retirement of the

Walters' note by the complete payment thereof by the defendant, W. G. Simpson, was retained by the bank and has never been returned to the defendant, S. D. Simpson, such testimony bearing directly upon the question of intent and being admissible after the Government had been permitted to prove the entire transaction from March to September 27th, inclusive.

STATEMENT.

The defendants offered to prove that when the certificate came in for payment on September 27th, the date it was due, the defendant, S. D. Simpson, took it to the directors and thereupon the directors ordered it paid, and the director Walters gave his note for enough money to pay the same and S. D. Simpson deeded his home to the bank, and a week later W. G. Simpson sent the money to pay the entire matter and take up the Walters note. This testimony was refused (114-115).

AUTHORITIES.

U. S. R. S. 5209.

ARGUMENT.

All of the offenses created by Section 5209 are dependent upon the intent therein demanded. The intent to injure or the intent to defraud is the very soul of the offense. The only way the Government can show an intent is to ask the jury to presume such intent from the facts disclosed surrounding the transaction. Manifestly the same rule applies for the benefit of the defendant. If his original acts are to condemn him, his later or subsequent acts ought to be allowed to explain what originally seemed wrong. The quick pay-

ment, therefore, of a certificate of deposit for which no funds had been placed in the bank is a most compelling act from which to judge the purity or impurity of the original act of issuing.

DEFENDANTS' FIFTH ASSIGNMENT OF ERROR.

The court erred in that portion of his general charge to the jury wherein he instructed the jury that the phrase "issued and put forth," as used in the bill of indictment, was fully satisfied by the placing of the blank certificate of deposit in question in the hands of the defendant, W. G. Simpson, by the defendant, S. D. Simpson, in the city of Idaho, even though such blank certificate did not, in fact, contain either date, name of payee, amount or maturity, and even though such certificate did not, in fact, pass out of the hands of W. G. Simpson until a much later date and in a different State, to-wit: the State of Mississippi, where the date and name of payee and amount and maturity were put therein by the defendant, W. G. Simpson, without the knowledge of the defendant, S. D. Simpson, and thereupon negotiated to an innocent holder in the State of Kentucky, because such instruction permitted the jury to convict these defendants for an offense committed beyond the jurisdiction of the court.

STATEMENT.

The case was being tried in the District Court of Idaho on an indictment which charged that the defendants had committed the transgressions therein complained of in the County of Canyon and State and District of Idaho (7). Each of the defendants testified —and there was no testimony to the contrary—that

the certificate as shown at page 143 of the record which was in the following words:

> "At Caldwell, Idaho, March 27th, 1913, No. 1991, W. G. Simpson has deposited in this bank Twenty-five Hundred and no-100 Dollars payable to the order of himself in current funds on the return of this certificate properly endorsed, six months after date, with interest after maturity. S. D. SIMPSON, Cashier. Due Sept. 27"

when handed to W. G. Simpson to be taken with others to Mississippi and other Southern States for negotiation, did not contain the words "March 27, 1913" nor the payee, W. G. Simpson, nor the amount, $2,500, nor the words, "Six months after date," nor the words "Due Sept. 27" (143-144). In other words, it was a mere blank piece of paper not dated, not payable to anyone, due at no time and containing no amount (102-144).

After W. G. Simpson reached Meridian, Mississippi, with the blank certificates, after having failed to make any trade in Chicago for the raising of money, he succeeded in making a loan with Baker, cashier of the Monticello, Ky., Banking Company, for a loan of $2,500 to be made upon his note with a certificate for that amount attached to it as security and he, W. G. Simpson, in the State of Mississippi, on or about April 9th, filled up the blank certificate, dating it, putting the name of the payee therein, the amount and the maturity, and forwarded it to the State of Kentucky, where it was negotiated with Baker and the proceeds therefrom Simpson sent to Caldwell, Idaho, for proper deposit (120-129). Undisputed facts (96, 97, 98).

The other blank certificates were afterwards returned by him, Simpson, to the bank.

The defendants asked the court to charge the jury in an appropriate, properly submitted special charge and at the proper time, as follows:

> **"You are instructed, gentlemen of the jury, that the pith of the charge in the indictment in this case is the issuing and putting forth of the certificate of deposit therein described without the consent of the board of directors of the bank and with the intent to injure and defraud that bank, and the allegation is made in the indictment that such issuing and putting forth was within the Idaho District and within the Southern Division of said District. This allegation is a matter of fact that must be proven by the Government to your satisfaction beyond a reasonable doubt, and you are therefore charged that if you should find, in accordance with the other instructions herein given you, that the certificate of deposit described in the indictment was not issued and put forth in the Southern Division of the District of Idaho but was issued and put forth in the State of Mississippi, or anywhere else than Southern Division of the District of Idaho, and to-wit: in Canyon County, or if you have a reasonable doubt upon this question, you will find the defendants, and both of them, not guilty" (37-38).**

Such special charge the court refused to give, to which action of the court the defendants duly and seasonably in open court excepted (91).

The defendants also requested, at the proper time, on this question of venue Special Charge No. 3 in the following words:

> **"You are charged as a matter of law, gentlemen, that the certificate in question was not issued or put forth in the legal sense of those two terms in Canyon County, Southern Division of the District of Idaho. If you find, as a matter of fact, that the certificate was not dated nor made payable to anyone, nor for any amount, but was in fact blank save and except that S. D. Simpson had signed the same when it left Canyon County, State of Idaho, it would be your duty to find the defendants and each of them not guilty" (39).**

Which charge the court refused to give in whole or in part, to which the defendants duly and seasonably excepted (92).

The defendants also requested in writing their special charge No. 4 in the following words:

> **"You are instructed, gentlemen of the jury, that if you find as a matter of fact that the certificate set forth in the indictment was actually filled out as to date and amount and maturity and payee and had all of its blanks filled in the State of Mississippi, or if you have any reasonable doubt upon this question, then, and in that event, it would be your duty to find the defendants, and each of them, not guilty; because in such event the certificate would not have been issued and put forth in the Southern Division of the District of Idaho as charged in the bill of indictment" (40).**

Which special charge the court refused to give either

in whole or in part, to which the defendants duly reserved exception (92-93).

The defendants also requested at the proper time the following special charge:

> **"You are instructed, gentlemen of the jury, that the words 'issued and put forth' as used in the indictment in this case and as used in the statute, have a special legal meaning, which is in substance, that the instrument declared upon in this prosecution, must have been complete at the time it went into the hands of the holder. In other words, it must have been dated, signed, must have carried an amount, a payee, and a maturity. In other words, a blank certificate could not have been issued and put forth within the meaning of the indictment and within the meaning of the statute" (36).**

Which special charge the court refused to give in whole or in part, to which action of the court the defendants duly reserved exception (93). Refusal to give the special charges also excepted to at proper time (87-88).

Upon this question the court did charge the jury in the following words:

> **"That is to say, gentlemen, it is quite unimportant whether this certificate was issued in blank or not. If in blank and if S. D. Simpson delivered it to his brother with authority to fill in the blanks and to negotiate it, in the contemplation of law that is the same as if it had been delivered to W. G. Simpson fully filled in with authority to negotiate it" (77),**

to which charge the defendants duly and seasonably in

open court before the jury retired, excepted (87-88; 88-89).

AUTHORITIES.

Vander Ploeg v. Van Zunk, 112 N. W. 807; 135 Iowa 350; 13 L. R. A. 490; 124 American St. Rep. 275.

Zimmerman v. Timmerman, 86 N. E. 540; 193 N. Y. 486.

City of Austin v. Nalle, 71 S. W. 414.

Scott v. Abbott, 160 Fed. 573.

Folks v. Yost, 54 Mo. App. 55.

Attorney' General v. Birkbeck, 12 Q. B. D. 605.

Baring v. Inland, etc., 1 Q. B. 90; 23 Cyc. 358; 23 Cyc. 367.

ARGUMENT.

The learned trial judge evidently confused the question of venue and the place of issuing with the question of the responsibility of S. D. Simpson for whatever his co-defendant, W. G. Simpson, did with the blank certificate. Whenever W. G. Simpson filled the blank or negotiated it or issued it or put it forth and in whatever jurisdiction or State these were done, S. D. Simpson was likewise responsible therefor, but until the blank in fact became a complete certificate, payable to somebody at some time in some amount and dated it was never "issued" or "put forth" in the legal sense of these terms. We have found but one case which holds that the date may be put in by the subsequent innocent holder, but that is as far as the authorities permit. In other words, a blank is nothing; it amounts to nothing; it represents nothing. It could not be and was not subject to commercial transactions until it began to live and have a being as to

amount, maturity and payee. "The issue," say the authorities, "of a bill or note is its first delivery, complete in form, to a person who takes it as a holder."

While the court may have refused to accept as proven beyond controversy what the defendants said, he could not, under the law, refuse to submit their defense, nor refuse to submit the issue of venue which was called to his attention by special charges.

The venue is a fact that must be proven by the prosecution to the jury beyond a reasonable doubt as certainly as must any of the charged facts be proven. This prosecution could have been brought in the State of Kentucky where the certificate was actually negotiated, or in the State of Mississippi, but certainly there is no proof whatsoever that a certificate of deposit for $2,500 payable to the order of W. G. Simpson and due in six months, as alleged in the bill of indictment, was ever issued or put forth in the State of Idaho, as alleged in the indictment. It was, therefore, not only the duty of the court to have submitted this issue to the jury but in the absence of this testimony his duty became clearer and more pronounced—he should have instructed a verdict of not guilty.

In the case of Zimmerman v. Timmerman, 86 N. E. 540, cited supra, it is held that a bond is "issued" when it comes into the hands of the holder so executed and delivered as to bind the obligator. The word "issue" is defined in the Century Dictionary "to send out, deliver for use, deliver authoratively." The county warrant is not issued unless actually delivered into the hands of the person authorized to receive it, says the

court in American Bridge Co. v. Wheeler, 76 Pac. 534. See alsho State National Bank v. Board of Commissioners, etc., 46 S. 307.

The word "issued" refers to the time of the sale of the bonds or when they passed into the hands of some one who claimed them as a debt against the city. City of Austin v. Nalle, 71 S. W. 414.

To argue further with reference to the words "issue or put forth," or with reference to a "blank" being the whole thing, is to return to the hopeless task of proving that twice 2 is 4.

It is quite true that had this issue been submitted to the jury that body might have found against the testimony of the defendants and the only direct testimony in the record in which event they would have had no complaint, but the question here presented is that the issue was fairly raised and that there was no proof of the issuing or putting forth as alleged in the indictment and that such fact was called to the attention of His Honor by several special charges, which were refused, to which action appropriate exception was reserved and that then the court instructed the jury that it was quite immaterial when, in fact, it is vitally material and jurisdictional. The blank piece of paper became a certificate of deposit payable to somebody in some amount at some time in a State other than Idaho.

There can be no questioning of the proposition that fundamental error was committed in this respect.

DEFENDANTS' SIXTH ASSIGNMENT OF ERROR.

The court erred in instructing the jury that they might convict the defendants, either or both of them, if they believed, beyond a reasonable doubt, that the

defendants, or either of them had, without the consent of the board of directors, etc., issued the certificate in question with the intent to injure **or** defraud because the indictment charged such intent to be in the conjunctive, to-wit: that such issuing **and** putting forth, etc., was done with the intent to injure **and** defraud.

STATEMENT.

The indictment uses the conjunctive "and" between the words "injure" and "defraud" wherever and whenever and at each time they are used therein (7-11). The court, in his charge to the jury, though having had the contention of the defendants repeatedly called to his notice by motion to quash and demurrers and by special charges, used in his charge the disjunctive "injure **or** defraud" (76; 79; 80; 82; 83; 84; 84).

To the action of the court in thus charging the jury, notwithstanding the allegations of the indictment, the defendants duly and seasonably in open court and before the jury retired reserved their exceptions (87-88; 90-91).

AUTHORITIES.

U. S. R. S. 5209.

Norton v. United States, 188 Fed. 256.

Billingsley v. United States, 178 Fed. 659.

ARGUMENT.

The indictment charged that the acts done therein were so done with the intent "to injure **and** defraud." The intent is never described in any other language, or phrase, or words, or word. The court evidently recognized that the language of the statute recognized two distinct intents, viz., the intent to injure or the intent

to defraud and made use of the disjunctive in his charge to the jury and thus charged the jury that they might convict if either intent existed, instead of rather than that they must believe that both intents existed before they could convict since it was so charged in the indictment. He uses the following language:

> "**Fifth, that it was issued with intent to injure OR defraud the bank or its depositors or stockholders" (76).**

Again:

> "**The offense defined by the statute was not complete unless there was at the time an intent to injure OR defraud the bank or some other person" (79).**

Again:

> "**Intent to injure OR defraud the bank is simply a willingness on the part of the defendants, the persons charged, to do an act which is violative of a right of the bank and its depositors or stockholders" (80-81).**

Again:

> "**And you will bear in mind that the charge here is not that the American National Bank was injured or defrauded but that the certificate was issued with the intent to injure OR defraud" (82).**

Again, when he began to charge on W. G. Simpson as aider and abettor:

> "**So as to him you must in addition find, First, that he aided or abetted S. D. Simpson, and Second, that he did so with like intent, that is, with intent to injure OR defraud the bank, or its depositors or stockholders" (84).**

Of course it needs no argument to sustain the proposition that the defendants must be tried upon the indictment as drawn and the court's charge must agree therewith and since the indictment charged that the defendants committed the acts with two intents, such intents being different and not synonymous, the measure of the law was unsatisfied and the defendants were deprived of their legal rights when the court authorized the jury repeatedly to convict if they found that either of the intents existed.

In other words, the charge of the court cannot authorize the conviction for any lesss measure than that carried and alleged in the indictment to which the defendants have plead not guilty.

In addition to the many times already mentioned that this was called to the attention of the court, the defendants, feeling greatly aggrieved, again reserved their exceptions to the charge of the court before the jury retired and in open court but, notwithstanding this, the charge was permitted to stand uncorrected (88).

In view of the fact that the jury remained out all night long and in the small hours of the morning returned to the court and asked to be re-instructed on the question of "intent"—a monumental question in the face of the fact that the certificates were sent out originally for the benefit of the bank and in the face of the fact that the bank had never lost a penny, and in the face of the fact that the issuing of the certificate was ratified by the directors when it did come in, and in the face of the fact that the defendants paid every penny of it at once, principal and interest—such in-

struction and such error is and was most hurtful to the defendants.

DEFENDANTS' TENTH ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' demurrer and motion to quash the indictment because said indictment states no offense against the laws of the United States in that the acts therein attempted to be alleged might be entirely innocent because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit the sum of money therein specified nor any part of it.

STATEMENT.

The indictment charges that the certificate of deposit was issued to W. G. Simpson when he "**Did not then and there, to-wit, at the time the certificate of deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association an amount of money then and there equal to the amount then and there specified in said certificate of deposit, to-wit: the amount of $2,500 or any amount or sum of money whatsoever**" (10) And again it charged, "**That he did not have the said sum of $2,500 or any sum at all on deposit with said Association**" (11).

This was a specific ground of the defendants' motion to quash and demurrers (23-24). The court overruled said motion and demurrers, to which the defendants duly and seasonably excepted (65-66).

AUTHORITIES.

U. S. R. S. 5209.

ARGUMENT.

It is quite unimportant whether one securing a certificate of deposit has any deposit whatsoever with t! bank from which he secures such certificate. The statute merely denounces the issuing of a certificate without the consent of the board of directors and with the intent to injure or defraud. Common sense teaches us that certificates may be issued and are issued to persons whether they are depositors or not if one has the money in his hand, or a note which the bank will accept, in his hand, or makes any other arrangement satisfactory to the bank or its officers, such bank or its officers is and are authorized to issue to him a certificate of deposit. He may be an entire stranger to the bank; he may never have done any business with the bank before that time; he may never do any after that with the bank. It is quite immaterial and quite unimportant whether he have a deposit or not.

Hence the indictment alleged a state of facts that showed no offense against the laws of the United States.

DEFENDANTS' THIRTEENTH ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' motion in arrest of judgment because such motion specifically attacked the vadility of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted and that the court had erred in the conduct of the trial and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from

said motion to arrest which is referred to and made a part of this Assignment.

STATEMENT.

This Assignment (153).

Motion for a new trial, etc. (62).

The motion to arrest and the motion for a new trial the court overruled, to which the defendants duly and seasonably excepted (145-146).

The jury retired at 9:45 p. m. Friday, February 26th to consider of their verdict, where they were held until 1 a. m. Saturday, the 27th, when they requested that the court send them his charge, and thereupon the court had the jury brought into the court room and his charge having been oral and taken down at the time it was given, by the court stenographer, who had not yet transcribed the same and who was not at that hour available, the court asked the jury upon what point they desired to hear the charge and the foreman thereupon arose and said: "We are not satisfied on the question of 'intent,'" and thereupon the court, so far as he could remember, resumed his original charge on the question of 'intent,' save and except he did not restate (such re-statements were not suggested by anyone) to the jury that if they had a reasonable doubt with reference to the intent that they should acquit the defendants, and thereupon the jury were re-taken to their room and, without sleep or succor or accommodation for either, spent the night therein, and at 7 o'clock on Saturday morning, February 27th, were taken to breakfast and immediately retired to the jury room and shortly after 10 o'clock they returned into open

court a verdict of "guilty," attaching to it this recommendation: "We earnestly urge leniency for the defendants." Immediately thereafter the defendants filed their motion for a new trial, alleging that the verdict was the result of mental and physical exhaustion and was a compromise verdict and was reached practically through coercion (95-96).

ARGUMENT.

All of the questions raised in this assignment have heretofore been treated or will hereafter be treated, and argument at this time on the entire record would be mere repetition.

DEFENDANTS' FOURTEENTH ASSIGNMENT OF ERROR.

The court erred in failing to grant these defendants a new trial because the verdict was the result of coercion and of mental and physical exhaustion.

STATEMENT.

This assignment is made up from Assignments Eleven and Fourteen (152; 153). The jury retired Friday night about 9 o'clock to their room to consider their verdict and were not allowed bed or succor; and about 1 o'clock on Saturday morning returned into the court room asking for further instructions on the question of "intent" which the court gave them and they continued to deliberate through all the hours of the night, were taken to breakfast about 7 o'clock Saturday morning, and immediately returned to their jury room, and shortly after 10 o'clock Saturday morning they returned a verdict of "guilty," earnestly urging clemency (95-96).

AUTHORITIES.

Peterson v. United States, 213 Fed. 920.

Suslak v. United States, 213 Fed. 913.

ARGUMENT.

It is not the contention of the defendants here that the court made use of any instructions which would amount to a coercion as defined and denounced by the learned trial judge in this case when he sat with this honorable court and rendered the opinion in the two cases cited above in the 213 Federal, but it is suggested that in the face of the almost technical nature of this prosecution and the insistence of the jury at an early hour of the morning for a re-statement of the instructions as to "intent," that a forced continuation of deliberation through the long hours of the night resulted in some sort of a compromise whereby the defendants were put in jeopardy of a five-years' term in the penitentiary because the jury, in that same verdict, "earnestly" recommended leniency.

It is respectfully submitted that no man or set of men are capable of such clear judgment as should be exercised, when they have gone through hours and days of a tedious trial and are then locked up in a room without food or sleep through the entire night and until the next day is far advanced.

DEFENDANTS' TWELFTH ASSIGNMENT OF ERROR.

The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, $3,500, because such testimony

was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had in March, 1913, when they issued, if they did issue, and put forth the certificate in question.

STATEMENT.

The Government was permitted to prove, over the objection of the defendants, that in September and prior to September 27th, 1913, the defendant, W. G. Simpson, had borrowed $3,500 from the American National Bank. This proof was duly excepted to (143). It had been testified by both the defendants that in August, 1913, S. D. Simpson had ascertained for the first time that the $2,425 which he had credited to the account of W. G. Simpson had really arisen from the sale of the certificate of deposit. This he ascertained from W. G. Simpson, who was at that time in Caldwell.

ARGUMENT.

The introduction of this testimony upon an entirely immaterial matter was permitted over the defendants' objection and made use of by the Government before the jury to show the utter disregard of the defendants for the indebtedness due by them for the outstanding certificate of deposit. It certainly was no criminal offense to have borrowed the $3,500 and its borrowing had no connection whatever with what had occurred in March, 1913, and it was only with what had occurred in March, 1913, that the court and jury were legitimately concerned. This testimony was most hurtful and damaging in that it showed that though the defendants both knew, by August, 1913, of the error with refer-

ence to the certificate and the crediting of the amount to W. G. Simpson's account and its use by him, and though W. G. Simpson borrowed $3,500 in the early days of September, the certificate was in fact not paid until September 27th, notwithstanding the fact that as soon as the certificate did appear on September 27th, it was ratified and paid. The force and effect of this improper testimony cannot be too strongly stressed. The whole atmosphere of the case, the hesitancy, the halting, the recommendation of the jury, clearly show the lack of that mental conviction which ought to be present in the minds of the tryers of men before such men shall suffer the penalty of the law and, therefore, any improper testimony which might have entered into their consideration should be presumed to have been harmful in the absence of a very clear apprehension that it could not have so been.

The admission of this evidence and the complaint that these defendants are now making to the court will receive added force from the fact that the court in his charge to the jury upon the question of intent, the vital part of what was being tried, used the following language:

> "**If, to illustrate my meaning, the defendants had immediately repaired the wrong before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their contention of innocent mistake. Whether you will give such significance to the restoration at a later date when the certificate had come to Caldwell and its existence was known, or must have become known, un-**

der all the circumstances of the case, I leave to you to say'' (82-83).

In other words, the court said to the jury in substance, which drew its mind directly to this improper testimony showing that the defendant had secured $3,500 from the bank the 1st of September: ''Now, gentlemen, if Simpson had used that $3,500 which he got about the 1st of September to pay this certificate, then you might properly consider such payment as tending to corroborate what they have said about being innocently mistaken.''

Another injury that this testimony wrought beyond question was that the defendants were continuing to get money out of the bank. In other words, having gotten the $2,500 certificate, they were not content at that but, about the 1st of September, borrowed another $3,500 and the fact that this $3,500 was a loan which, like the $2,500, was promptly paid at maturity, did not relieve the transaction of the improper sting and improper influence upon the minds of the jury.

DEFENDANTS' TWENTY-THIRD ASSIGNMENT OF ERROR.

The court erred in failing to give the defendants' requested charge No. 5 wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the $2,425 would not be the venal intent demanded under the statute and under the indictment before conviction, because the law demands that one's act be measured criminally by the intent existing at the time the act was committed.

STATEMENT.

The amount realized upon the certificate of deposit after it had been filled out in Mississippi by defendant W. G. Simpson and hypothecated as collateral to his note in Kentucky was $2,425 (123). This money W. G. Simpson sent to the First National Bank of Caldwell by transmitting to that institution his check for that amount drawn on the Southern National Bank of Louisville, where he had deposited the $2,425 realized (123-124). The check book containing the stub upon which simultaneous entries were made at the time of the drawing of his check was offered in evidence by the defendants as part of the res gestae, but such offer was refused by the court, to which action of the court the defendants duly excepted (125-146). The Government had been permitted to prove, over the objection of the defendants, that the defendant W. G. Simpson, had borrowed $3,500 in the early days of September (143). When W. G. Simpson had secured the $2,425, he wrote a letter to the American National Bank in which he enclosed a check for that amount, directing that the proper entry be made in the books of the bank to show the issuing of such certificate (127). By some error S. D. Simpson, cashier, placed the $2,425 to the credit of W. G. Simpson and did not make the entry to the time certificate accounts, and thereafter W. G. Simpson continued to, as he had always done, check upon his account when necessary, and it was in August that the error was discovered (127-128). The defendants, upon this state of facts, requested the following charge in writing at the proper time:

"You are instructed, gentlemen of the jury,

that the only charge against these defendants, or either of them, is the issuing of the certificate of deposit set forth in the indictment without the consent of the board of directors and with intent to injure and defraud the bank, and in coming to your conclusion as to whether or not the Government has established its allegations with respect to this question, beyond a reasonable doubt, you shall not consider the depositing of the $2,425 to the account of W. G. Simpson, nor the subsequent transactions with relation thereto, for the reason that the intent to injure and defraud as alleged in the indictment and demanded by the law to constitute the acts an offense, is the intent that existed in the minds of the defendants at the time of the issuing and not an intent or determination they formed thereafter; and if you believe or have a reasonable doubt as to whether they had the intent to injure and defraud at the time the certificate was issued and put forth, then it would be your duty to acquit the defendants, and both of them" (41);

which charge was refused, to which action of the court in refusing such charge, or the substance thereof, the defendants duly and seasonably in open court excepted (88).

The court charged:

"If, to illustrate my meaning, the defendants had immediately repaired the wrong before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their evidence of innocent mistake" (82).

Again the court charged:

"It is essential to guilt here that a wrongful

intent must have existed at and prior to the time the certificate was hypothecated in Kentucky'' (84).

ARGUMENT.

It will thus be seen that the failure of the defendants to pay the certificate in August must have been considered by the jury, under the court's instruction, as leaving the defendants' explanation as to the sending of the blanks for the purpose detailed without any corroboration whatsoever and therefore valueless!

DEFENDANTS' TWENTY-FOURTH ASSIGNMENT OF ERROR.

The court erred in failing to give the defendants' specially requested charge No. 6 wherein it was asked that the jury be instructed to acquit the defendants, since the proof did not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court.

STATEMENT.

This Assignment (157).

The defendants requested duly and seasonably the following special charge:

''You will find the defendants not guilty'' (42), which the court refused to give, to which action of the court the defendants duly and seasonably excepted (87).

The defendants also requested the following special charge duly and seasonably:

''You are instructed, gentlemen of the jury, to find the defendants not guilty of the charge made against them in the indictment'' (29).

The defendants also requested duly and seasonably the following special charge in writing:

> " * * * and the allegation is made in the indictment that such issuing and putting forth was within the Idaho District and within the Southern Division of such District. This allegation is a matter of fact that must be proven by the Government to your satisfaction beyond a reasonable doubt, and you are, therefore, charged that if you should find, in accordance with the other instructions herein given you, that the certificate of deposit described in the indictment was not issued and put forth in the Southern Division of the District of Idaho, but was issued and put forth in the State of Mississippi, or anywhere else than the Southern Division of the District of Idaho, or if you have a reasonable doubt upon this question ,you will find the defendants, and both of them, not guilty" (37-38),

which was refused by the court, to which action of the court the defendants duly excepted (87-88).

The court charged the jury that it was quite unimportant whether the certificate was issued in blank or not. If S. D. Simpson delivered the blank certificate to his brother in Idaho with authority to fill it out elsewhere and it was filled out elsewhere, such certificate was issued in Idaho (77), to which the defendants duly excepted (98-99).

There was no direct testimony with reference to the place of issuing or putting forth of the certificate in question save and except that the certificate in question was one of a number of blank certificates that had theretofore been printed for the American National Bank of Caldwell, about 1500 of which had theretofore

been issued. The defendants testified that about March 20, 1913, they, having heard that a large portion of the deposits of the bank were about to be withdrawn by the city of Caldwell so as to give all of the other banks in town a portion thereof, concluded that the president of the bank, who was the defendant, W. G. Simpson, and who was aequainted in Miss. and Ky., with men who were supposed to have money and who was going to that section where he resided, should take with him some of the blank certificates of deposit, upon which the defendant, S. D. Simpson, would sign his name as cashier, for the purpose of securing upon them funds to replace the public deposit that was about to be withdrawn from the bank; that thereupon five certificates without date, amount, maturity or payee written therein but simlpy being signed: "S. D. Simpson, Cashier," were given to W. G. Simpson for that purpose, and he went to the State of Mississippi from which point; on April 9th, 1913, he succeeded in making a loan of $2,500 from a bank in Kentucky upon his own personal note for that amount with a certificate of deposit for $2,500 attached thereto as collateral security, and the defendant, W. G. Simpson, thereupon in Mississippi with a typewriter put the date of March 27th, 1913, in No. 1991 the said certificate, and wrote his own name as payee therein, and he wrote six months as the maturity thereof and made the amount to be $2,500 and transmitted the same to the innocent holder at Monticello, Kentucky, who discounted the same for $2,425, which amount he sent to W. G. Simpson, who in turn sent the same to S. D. Simpson, cashier of the bank in Idaho, with a letter instructing S. D. Simpson to credit

the amount to the certificate of deposit account (96-98). The same was deposited by S. D. Simpson to the credit of W. G. Simpson's individual account from which it was checked out by him in the course of business and prior to August 20th, 1913 (98).

ARGUMENT.

The uncontradicted testimony, therefore, shows that the certificate continued to be blank until it reached the State of Mississippi and that it was negotiated in the State of Kentucky and that the proceeds therefor were in good faith sent for the use of the bank as originally planned by the defendants.

Appropriate instructions, therefore, should have given the jury to understand that the use of this money afterward by the continuing to check upon the individual account of himself could not be taken as a circumstance—even a remote one—to shed any light upon such intent as existed in March or April of 1913, unless, also, the jury were allowed to consider the question of payment without any circumscription as to whether such payment was made at the first or second or third opportunity.

DEFENDANTS' TWENTY-EIGHTH ASSIGNMENT OF ERROR.

The court erred in failing and refusing to give the defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore if they found that the board of directors, or if they had a reasonable

doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all of the facts with relation thereto, then and in that event such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well known rule of ratification, which dates back to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed.

STATEMENT.

The record discloses that there was no direct testimony whatsoever as to when and where the certificate in question was issued save and except the testimony of the defendants and the circumstances of the hypothecation of the certificate with the Kentucky bank which showed beyond cavil that the certificate left the State of Idaho blank as to date, amount, payee and maturity and continued in that condition until it was made a certificate of deposit in Mississippi by W. G. Simpson and hypothecated by him in Kentucky (96-98). The defendants offered to prove by the directors that when the certificate came in on September 27th, 1913 for payment, that being its due date, that the directors ratified its issuance and ordered it paid, which proof the court declined to permit, to which ruling the defendants duly then and there excepted (114-115). At the conclusion of the testimony and at the proper time the

defendants requested the following written special charge to the jury:

> **"You are charged, gentlemen of the jury, that the law under which these defendants are being prosecuted does not state when the consent of the board of directors shall be secured with reference to the issuance of a certificate of deposit, whether such consent shall be prior to its issuance or after its issuance, nor does it prescribe any particular time for such consent either before or after such issuance and, therefore, if you find that the board of directors of the American National Bank, or have a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, acknowledged it as the debt of the bank and ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all the facts with relation thereto, then and in that event such consent and ratification would date back to the time of the certificate's original issuance and constitute a consent to such original issuing" (46),**

which special charge the court refused to give in whole or in part or the substance thereof, to which refusal the defendants duly and seasonably in open court before the jury retired excepted (87; 94).

In fact the court charged nowhere in even the slightest or remotest degree upon this question of ratification (72-88), and as before stated, refused the testimony offered showing such ratification.

It will further be observed that the court refused to give another special charge requested by the defendant at the appropriate time, to which exception was duly reserved and which is in the following words:

> **"You are further instructed, gentlemen of the**

jury, that the statute under which this indictment is found and under which these defendants are being prosecuted, does not require or demand that the consent of the board of directors of a bank shall be secured concurrent with the issuance of a certificate of deposit'' (45).

AUTHORITIES.

Those cited under Third Assignment of Error and also:

National Bank v. Insurance Co., 103 U. S. 783.

Insurance Co. v. McCain, 96 U. S. 84.

Cresswell v. Lanahan, 101 U. S. 347.

Cook v. Tullis, 18 Wall. 332.

Boyle v. Zacharie, 6 Pet. 635.

Clews v. Jamieson, 182 U. S. 461.

United States v. City Bank, 21 How. 356.

Pickering v. Lomax, 145 U. S. 310.

Clark v. Reeder, 158 U. S. 505.

Supervisor v. Schenck, 5 Wall. 772.

Jones v. Guaranty, etc., 101 U. S. 622.

Western National Bank v. Armstrong, 152 U. S. 346.

Insurance Co. v. Davis, 95 U. S. 425.

ARGUMENT.

The case made by the defendants and which was not disputed by any direct testimony whatever, showed an original good faith act. This case, in theory, bound the court to submit the same to the jury. In other words, the defendants were entitled to have their side affirmatively submitted. Whatever may be said with reference to the ratification of acts that are illegal or immoral or against public policy does not apply to the reasoning here contended for. What they did they

claimed to be for the benefit of the bank and therefore not immoral, or illegal, or against public policy. The defendants assert, may it please the Court, that the entire case made by the Government and the defendants, demanded the admission of the proof and the submission of the special charges, but even if the defendants be mistaken in this position, they were entitled to have this question submitted and the evidence allowed as a fair presentation of their side of the case and in an affirmative manner.

The court will bear in mind, of course, that the record shows that the consent of the directors was not given to Cashier S. D. Simpson each time he issued a certificate of deposit. Such authority was merely assumed from his position as cashier and therefore existed as a matter of law. The court charged the jury that such assumed authority could not and did not exist when the money, or its equivalent was not paid into the bank simultaneous with the issuing of the certificate (89-90), which has heretofore been controverted as a correct proposition of law. This charge expressed clearly to the jury the view that no implied authority existed in favor of the defendants since nothing of value passed to the bank at the time the blank certificate was given to W. G. Simpson by the cashier S. D. Simpson in March in Caldwell, Idaho. Therefore the issue is clear cut. The court used the following language:

> "**In other words, there is no general authority in a cashier to issue a certificate of deposit, except in cases where the bank has received the money or its equivalent and the fact that the board of directors may know it to be the practice**

of the cashier to issue certificates of deposit covering monies actually received and acquiesced therein does not imply an assent upon their part to the issuance of a certificate when no money or other thing of value is received, and so in this case the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made, would constitute no warrant to the defendant cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value'' (89-90).

It cannot be contradicted, however, that such general authority over the bank and its affairs would authorize a good intentioned man to attempt to do for the benefit of the bank what the defendants did in this case, and if such things were done with **good intentions** they were neither illegal, immoral, nor against public policy, though they may have been loose business and hence the authorities cited in support of this proposition are absolutely in point as the general doctrine of ratification applied.

All of the requirements of a valid ratification existed. The directors knew the facts and they elected to act and they did act. A ratification of the act of an agent is equivalent to the possession by him of a previous authority and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. To ratify is to give validity to the act of another, says the Supreme Court, in Norton v. Shelby, 118 U. S. 425, and is equivalent to possession by the agent of a previous authority, Storey on Agency, 9th Edition, Sec. 239, Notes 1 and 2, and a

multitude of authorities cited in Note 3 on page 697 of Volume 9 of the Encyclopedia of the United States Supreme Court Reports. The general rule is that such ratification—that is, ratification with knowledge, in the absence of fraud—operates upon the act ratified precisely as though authority to do the act had been previously given. When the act is so ratified it is as binding upon the principal as if he had given original authority to that effect and a ratification relates back to the time of the act which is ratified. A subsequent ratification is equivalent to a prior order.

Manifestly it seems that the defendants should have been permitted to prove the action of the directors.

"EQUIVALENT IN VALUE."

The learned trial judge said that there would be no presumed authority for the cashier to issue a certificate unless the bank received to its credit an "Equivalent in value." Now, may I, in all seriousness, ask just what was the "Equivalent in value" of a blank certificate which called for no amount, was payable to no one and matured at no time? What equivalent in value could have been deposited with the bank?

DEFENDANTS' TWENTY-NINTH ASSIGNMENT OF ERROR.

The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said cer-

tificate with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant S. D. Simpson, for that purpose, then and in that event, they should acquit the defendant, W. G. Simpson, because such instruction stated the law (159-160).

STATEMENT.

The defendants requested the court to charge the jury in substance that if W. G. Simpson disposed of the certificate in question with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event they should acquit the defendant, W. G. Simpson (159-160). The defendant, W. G. Simpson, succeeded in negotiating the certificate in Kentucky and sent the proceeds thereof to the Idaho bank for appropriate credit, together with a letter, a copy of which is as follows:

"April 11th, 1913.

Mr. S. D. Simpson, Cashier,
American National Bank,
Caldwell, Idaho.

My Dear Brother:

I have succeeded in placing your Time Certificate No. 1991 for $2,500 and enclose you herewith my check on the Southern National Bank of Louisville for the proceeds of same, $2,425.

I could not place the certificate direct but had to put up my note for the amount and attach the certificate to same as collateral, therefore it is made out in my favor and dated March 27th, and due six months after date, which will mature in ample time to take care of my note.

You will therefore debit 'Interest Paid' $75 and my check enclosed for $2,425 will make the credit of the certificate $2,500 which I suggest that you enter as 'Time Certificates for Money Borrowed' while the C-D is not in a way placed, it is placed because it is out as collateral to my note for the use of the bank.

I had to pay 6% for the money as I could not get it at 5%. Could I have gotten it at 5% rate direct without having to put up my note, it could be entered as a regular C-D but money is tight in this section as well as in the West.

I hope this will give you some relief and if I am able to handle the others or any of them will do so and report to you, giving numbers, dates, amounts, etc., so that the proper entry can be made at that end of the line; in the meantime I hold the other certificates subject to your orders and I assure they are safe in my deposit box and will be taken care of and accounted for to you at any time'' (127-128).

The defendant, S. D. Simpson, made an error and credited it to W. G. Simpson's individual account.

Exceptions were reserved to the court's failure to give the charges (88).

The court charged the jury on this question in his remarks with reference to S. D. Simpson and nowhere did he submit this issue when he began to charge directly upon the case of W. G. Simpson (83-87).

In charging upon the defendants, in that portion of the charge relating to S. D. Simpson he merely tells the jury that if what S. D. and W. G. Simpson say about it is true then, of course, the jury could not convict (83-84), but he does not tell them that if they

have a reasonable doubt as to whether it is true or not, they should acquit.

In commenting on the testimony of the defendants who had chosen to testify, the court said:

> **"Of course, if you find that the defendants have testfied truthfully, then you will give the same force and effect to their truthful testimony that you will give to the testimony of any other witnesses" (86).**

ARGUMENT.

A careful verification of the foregoing statement shows how meagerly the defenses of the defendants were submitted to the jury and how meagerly, not to say sparsely, the defenses of the defendant W. G. Simpson, were submitted.

Again, the ~~defendants~~ jury were told that if they did finally find that the defendants had testified **truthfully**, then they should give the same effect to their **truthful** testimony as they gave to the testimony of any other witnesses. Without saying that the testimony of such other witnesses should also be **truthful** and be found to be truthful by the jury.

The submission of an affirmative defense is always obligatory and should be accompanied with the additional charge that if the ~~defendants~~ jury have a reasonable doubt as to its correctness or truthfulness they shall resolve that doubt in favor of the defendants.

It is respectfully maintained that this action constituted a reversible error as to W. G. Simpson without any question of a doubt.

CONCLUSION.

The treatment of the foregoing assignments of error

includes practically all of the questions raised in the thirty-one assignments and submits for the court's determination the following contentions:

(a) There was error in the court's action on the plea of jeopardy.

(b) There was error in the court's action on the demurrers and motion to quash.

(c) There was error in the court's ruling on the ratification by the directors of the issuance of the certificate of deposit.

(d) There was error in the court's ruling as to venue or place where the certificate was issued or put forth.

(e) There was error in the method pursued in holding the jury without accommodations for rest or deliberation.

(f) There was error in the manner in which the question of intent was submitted to the jury.

(g) There was error in the court's charge and in his refusal to give certain special charges.

(h) There was error in admitting incompetent testimony.

The whole case arose over the desire of the defendants to do something for the bank, and it is respectfully suggested that a good-faith effort and a subsequent mistake and a later repairing of that mistake without any injury whatsoever to the institution should be in insufficient in this splendid country to warrant the taking of the liberty of two citizens for five years.

For the errors pointed out we have the honor to

respectfully ask that the indictment be ordered dismissed and the judgment reversed, or, at least, that the cause be reversed and remanded.

Respectfully,

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WILLIAM H. ATWELL,
Attorneys for the
Defendants-in-Error.

ADDITIONAL EXPLANATION.

The indictment upon which the trial was had in September, 1914, and the indictment upon which the trial was had in 1915 bore the same number, to-wit: No. 563. The clerk, of course, filed all of the papers pertaining to No. 563 in said file and therefore the court will find a number of special charges in the record which appear to be duplicates, or some of which appear to be inapplicable to the case as now presented. This is explained by the fact that the special charge requested and filed upon the first trial are also included in this record as well, of course, as the special charges and requests upon the second trial. It is thought, however, that the numbers in the parenthesis in this brief will assist the Court in avoiding any confusion.

The special charges found on pages 25 to 33 inclusive are the charges of the first trial in September, and the requested charges on pages 34 to 51 inclusive are the requested charges of the second trial.